

Honorable Catherine D. Perry

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,

Plaintiff,

v.

B & D ELECTRIC, INC., *et. al*,

Defendants.

No. 1:05-CV-00063-CDP

**CONSENT DECREE  
WITH DEFENDANT DELTA-Y  
ELECTRIC CO.**

**I. BACKGROUND**

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 107 and 113(g)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9607 & 9613(g)(2), as amended ("CERCLA"), seeking reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Missouri Electric Works Superfund Site in Cape Girardeau, Missouri ("the Site"). The United States also seeks a declaratory judgment of liability pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2).

B. Settling Defendant Delta-Y Electric Co. ("Settling Defendant") filed a counterclaim against the United States alleging that, pursuant to CERCLA Section 113(f), 42 U.S.C. § 9613(f), the United States is liable to Settling Defendant for an equitable share of any costs imposed on Settling Defendant.

C. The United States and Settling Defendant agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of the complaint and counterclaim in this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

D. The United States has reviewed the Financial Information submitted by Settling Defendant to determine whether Settling Defendant has an inability or a limited ability to pay response costs incurred and to be incurred at the Site. The United States has taken into consideration Settling Defendant's ability to pay response costs and still maintain its basic business operations, and has considered Settling Defendant's overall financial condition and demonstrated constraints on its ability to raise revenues. Based on the Financial Information, the United States has determined that Settling Defendant qualifies for a reduction in settlement amount.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. Sections 1331 and 1345, and 42 U.S.C. Sections 9607, 9613, and 9620, and also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the entry of this Consent Decree, or this Court's jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States, and upon Settling Defendant, as well as its successors and assigns. Any change in ownership or corporate or other legal status,

including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

#### **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated pursuant thereto shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto.
- c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.
- e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.
- g. "Financial Information" shall mean those financial documents identified in Appendix A.
- h. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject

to change on October 1 of each year.

i. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

j. "Parties" shall mean the United States and Settling Defendant.

k. "Plaintiff" shall mean the United States.

l. "Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or DOJ on behalf of EPA has paid or will pay at or in connection with the Site, plus accrued Interest on all such costs through such date.

m. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

n. "Settling Defendant" shall mean Delta-Y Electric Co., a defendant and counterclaimant in this action.

o. "Site" shall mean the Missouri Electric Works Superfund Site, located in Cape Girardeau, Missouri.

p. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### **V. PAYMENT OF RESPONSE COSTS**

4. Within 30 days of entry of this Consent Decree, Settling Defendant shall pay FIVE THOUSAND DOLLARS (\$5,000) to the EPA Hazardous Substances Superfund, in accordance with payment instructions to be delivered to the Clerk by the Office of the United States Attorney for the Eastern District of Missouri.

5. If Settling Defendant fails to make the payment required by Paragraph 4 within 30 days of entry of this Consent Decree, Interest shall accrue on the unpaid balance through the date of payment, and shall be included by Settling Defendant in its payment.

6. At the time of payment, Settling Defendant shall send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions). Such notice

shall reference the EPA Region and Site/Spill Identification Number 07-6R, DOJ case number 90-11-2-614/1, and the civil action number 05-00063-CDP.

7. If Settling Defendant fails to make the payment required by Paragraph 4 within 30 days of entry of this Consent Decree, Settling Defendant shall also pay, as a stipulated penalty, \$250 per day for each day such payment remains unpaid.

8. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments under Paragraph 7 shall be identified as "stipulated penalties" and made to the EPA Hazardous Substance Superfund, in accordance with payment instructions to be delivered to Settling Defendant by the Office of the United States Attorney for the Eastern District of Missouri.

9. At the time of any payment referenced in Paragraph 7, Settling Defendant shall, in accordance with Section XIII (Notices and Submissions), send notice to EPA and DOJ that the payment has been made. Such notice shall reference the EPA Region and Site/Spill Identification Number 07-6R, DOJ case number 90-11-2-614/1, and the civil action number 05-00063-CDP.

10. Penalties shall accrue as provided above regardless of whether EPA has notified Settling Defendant of a violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due or the day a violation occurs, and penalties shall continue to accrue through the date of payment or the final day of correction of the noncompliance.

11. If the United States prevails in any action to enforce this Consent Decree, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

12. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendant from

compliance with this Consent Decree.

#### **VI. COVENANT NOT TO SUE BY PLAINTIFF**

13. Covenant Not to Sue by United States. Except as specifically provided in Section VII (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 107 and 113(f) of CERCLA, 42 U.S.C. § § 9607, 9613(f), with regard to the Site. This covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V (Payment of Response Costs). This covenant not to sue is conditioned upon the veracity and completeness of the Financial Information submitted by Settling Defendant. If the Financial Information is subsequently determined by EPA to be false or in any material respect inaccurate, Settling Defendant shall forfeit all payments made pursuant to this Consent Decree and this covenant not to sue and the contribution protection in Paragraph 20 of the Consent Decree shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from Settling Defendant's false or materially inaccurate information. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

#### **VII. RESERVATIONS OF RIGHTS BY UNITED STATES**

14. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to reinstitute or reopen proceedings against Settling Defendant in this action or in a new action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the Financial Information provided by Settling Defendant, or the financial certification made by Settling Defendant in Section X of the Consent Decree is false or in any material respect inaccurate.

15. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiff in Paragraph 13. Notwithstanding any other provision of this Consent

Decree, the United States reserves all rights against Settling Defendant with respect to:

- a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;
- b. criminal liability; and
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

#### **VIII. COVENANT NOT TO SUE BY SETTLING DEFENDANTS**

16. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site, including but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claim arising out of the response actions at the Site for which the Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of Missouri, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

17. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

#### **IX. DISMISSAL OF COUNTERCLAIM WITH PREJUDICE**

18. Upon entry of this Consent Decree by this Court, the counterclaim asserted by Settling Defendant in this action is hereby dismissed with prejudice.

## **X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

19. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

20. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and Response Costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person.

21. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

22. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing



in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VI.

#### **XI. CERTIFICATION**

23. Settling Defendant certifies that it has submitted Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time Settling Defendant executes this Consent Decree.

#### **XII. RETENTION OF RECORDS**

24. Until 10 years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

25. After the conclusion of the 10-year document retention period in the preceding paragraph, Settling Defendant shall notify EPA and DOJ at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendant shall deliver any such records to EPA. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, they shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no records

created or generated pursuant to the requirements of this or any other settlement with the United States pertaining to the Site shall be withheld on the grounds that they are privileged.

26. Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e).

### **XIII. NOTICES AND SUBMISSIONS**

27. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless the Parties give each other notice of a change in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, and Settling Defendant, respectively.

#### **As to DOJ:**

Bruce Gelber  
Chief, Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044-7611

#### **As to EPA:**

Alex Chen  
Assistant Regional Counsel  
EPA Region 7  
901 N. 5th Street  
Kansas City, KS 66101

#### **As to Settling Defendant:**

Dale Robinson  
Delta-Y Electric Co.  
Route 1, Box 24A  
P.O. Box 218  
Sedgewickville, MO 63781

Joseph G. Nassif, Esq.  
Husch & Eppenger, LLC  
190 Carondelet Plaza, Suite 600  
St. Louis, Missouri 63105

#### **XIV. RETENTION OF JURISDICTION**

28. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

#### **XV. INTEGRATION**

29. This Consent Decree constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. Appendix A is hereby incorporated into and integrated into this Consent Decree.

#### **XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

30. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

31. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

#### **XVII. SIGNATORIES/SERVICE**

32. The undersigned representative of Settling Defendant, and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice, hereby certify that they are authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally to this document the Parties they represent.

33. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

**XVIII. FINAL JUDGMENT**

34. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between the United States and Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_.

UNITED STATES DISTRICT COURT

THE UNDERSIGNED PARTY hereby enters into this Consent Decree in the matter of United States v. B & D Electric Co., No. 05-00063-CDP (E.D. Mo.), relating to the Missouri Electric Works Superfund Site:

FOR THE UNITED STATES OF AMERICA

2/27/87

Date

MATTHEW J. McKEOWN  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date

CYNTHIA FERGURSON  
SEAN CARMAN  
Trial Attorneys  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
(202) 514-2746

CATHERINE L. HANAWAY  
United States Attorney  
Eastern District of Missouri

SUZANNE J. MOORE  
Assistant United States Attorney  
Thomas Eagleton U.S. Courthouse  
111 S. 10th Street, 20th Floor  
St. Louis, Missouri 63102  
(314) 539-2200

THE UNDERSIGNED PARTY hereby enters into this Consent Decree in the matter of United States v. B & D Electric Co., No. 05-00063-CDP (E.D. Mo.), relating to the Missouri Electric Works Superfund Site:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Assistant Administrator for Enforcement and  
Compliance Assurance  
U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

\_\_\_\_\_  
JOHN B. ASKEW  
Regional Administrator  
Region 7  
U.S. Environmental Protection Agency  
901 N. 5th Street  
Kansas City, KS 66101

\_\_\_\_\_  
ALEX CHEN  
Assistant Regional Counsel  
Region 7  
U.S. Environmental Protection Agency  
901 N. 5th Street  
Kansas City, KS 66101

THE UNDERSIGNED PARTY hereby enters into this Consent Decree in the matter of United States v. B & D Electric Co., No. 05-00063-CDP (E.D. Mo.), relating to the Missouri Electric Works Superfund Site:

FOR DEFENDANT DELTA-Y ELECTRIC CO.:

\_\_\_\_\_  
Date

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

FOR DEFENDANT DELTA-Y ELECTRIC CO.:

Dale Robinson

Address: 513 Hiden Meadow Drive  
Jackson, MO 63755